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783-112—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 321

FOTOCHROME, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3–9) is reported at 343 F. 2d 631. The decision and order of the Board (J.A. 2–72) [1] are reported at 146 NLRB 1010.

JURISDICTION

The decree of the court of appeals (Pet. App. 1–2) was entered on April 30, 1965. The petition for a writ of certiorari was filed on July 6, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." references are to the printed record prepared for the court below and filed with the petition.

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that the employer unlawfully assisted one of two unions competing for majority status and that an ensuing strike was caused by this unfair labor practice.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 10–11 of the appendix to the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Company, a firm engaged in the business of photofinishing, film processing, and the distribution of photographic equipment, had for several years recognized Local 249 of the Jewelry Workers' Union [2] as the exclusive bargaining representative of the employees at its Bronx and Elmsford, New York plants (J.A. 21–22; 92–93, 384). The usual practice was for Local 249 to negotiate its bargaining contract with the Photo Finishers Association, a multi-employer group. After agreement was reached, the contract would be ratified by the employees of non-member employers and then those employers, including the Company, would sign riders to the overall agreement adopting the contract (J.A. 22–23; 96).

[2] Blue Print, Photostat & Photo Employees Union Local 249, International Jewelry Workers' Union, AFL–CIO.

The 1960 contract expired on April 30, 1962 (J.A. 23; 82). About May 1, 1962, Local 249 and the Association agreed on a three-year contract, to run until May 1, 1965 (J.A. 24, n. 12; 107). On May 22, the employees of the independent employers, including the Company's employees, ratified the contract (J.A. 25; 111–112). However, the Company objected to certain terms of the agreement and a meeting, between the Company's president, Nadaline, and Mack Young, an official of Local 249, was set for May 29 to discuss these issues (J.A. 25, n. 13, 59; 113–114, 117, 160).

1. On the morning of May 28, employee Mary Giannantonio, who had been shop steward for Local 422, International Production Service and Sales Employees' Union, when she was at another company, asked Plant Manager Silvio Ricciardi at the Elmsford plant about rumors that Local 249 was about to call a strike (J.A. 4–5, 25–26; 303, 317). Giannantonio and other employees also inquired whether there was a contract in effect between the Company and Local 249 (J.A. 26; 304). Ricciardi called "all the girls out," and told them that Local 249's contract had expired (J.A. 4, 6; 304, 318). He then permitted Giannantoni to take over the meeting, and she told the employees that, if they did not want to strike, they should bring in another union (J.A. 4, 26, n. 14; 304, 318). Giannantonio telephoned the office of Local 422 and left word for Jinnie Matienzo, its president, to come to the Elmsford plant (J.A. 5, 26; 304, 312–313, 372–373).

Ricciardi telephoned President Nadaline and told him that the employees were talking of joining a new union in order not to go on strike. Nadaline told

Ricciardi to get the girls back to work and not interfere. (J.A. 5, 26, 59; 319, 404–406.)

Matienzo reached the Elmsford plant shortly after 2 p.m., and was met by Giannantonio (J.A. 5, 26; 304, 376). Ricciardi saw Matienzo outside the plant talking to some employees, and told the other employees to take their coffee break and go out and listen to Matienzo (J.A. 5, 27; 320, 328). When the employees returned, Ricciardi himself spoke to Matienzo and signed a card for Local 422 (J.A. 5, 27; 320). After Matienzo left the Elmsford plant, he sent the Company a telegram demanding recognition as bargaining representative for that plant (J.A. 5, 27; 375, 87).

2. Thereafter, Matienzo and two of his organizers went to the Bronx plant. During the rest of the afternoon of May 28, they secured about 75 signed authorization cards, whereupon Matienzo sent another telegram to the Company demanding recognition for Local 422 at that plant. (J.A. 27–28; 374, 375–376, 377–378, 87.) These cards were signed under the following circumstances:

(a) Supervisor John Paraggio took employee Herrick from his work in the enlarging room and brought him across the street to the Local 422 organizers who were distributing cards. Paraggio stated that he had signed a card and urged Herrick to do so too. Herrick refused. (J.A. 5, 33, 35; 182–183, 341–342, 351.) Shortly afterward, Herrick was present in President Nadaline's office when the latter reprimanded Paraggio for signing with Local 422 and instructed him to tell the employees that they did not have to sign (J.A.

5, 36, n. 29, 60; 188, 405–406). Instead of relaying this instruction, Paraggio again called Herrick out of the shop and asked him to sign up with Local 422. Once more Herrick refused. (J.A. 5–6, 35; 184–185.)

(b) Alfred Canning, who supervised the shipping department, sent an employee, on Company time, to listen to the organizers for Local 422 (J.A. 6, 32; 194, 200, 206). He also went to the packing department and asked the employees there whether they had signed (J.A. 6, 36–37, 41, 55, n. 44; 206, 211, 214, 201–202, 289). He stated that Local 422 had better benefits and that, if the employees joined it, they would neither lose the money they had paid Local 249 previously, nor have to pay any initiation fee (J.A. 37; 207). When employee Lambert said that she had not signed, Canning asked what they were waiting for (J.A. 37, 41, 55, n. 44; 200, 207–208, 211, 212, 214, 290). Lambert and three other employees then left work, went outside to the organizers, and signed cards. They were paid for their time. (J.A. 37; 208, 211, 212, 214, Tr. 537.) Lambert testified, "It seemed like an order and so we went to sign" (J.A. 37; 209).

(c) Supervisor George Kurtz, using the Company intercom, called employee Hector Nieves out of the enlarging department (J.A. 39; 223–224). Kurtz told Nieves that another union, better than the one he had, was signing up the employees and that he thought it wise for Nieves to go across the street and sign, for the Company would know which employees did not join (J.A. 6, 39; 224). Kurtz added that the Company would close down if Local 422 was not brought in, because the old union was not providing

enough new accounts (J.A. 6, 39; 224–225). Nieves declined to sign and returned to the plant. When Kurtz repeated his warning that the Company would know, Nieves left the plant and signed with Local 422 (J.A. 39; 225).

Thereafter, Kurtz told employee Fonseca that there was a new union across the street, that it was better than the old one, and that Fonseca should go across the street and look into it (J.A. 6, 38, 55, n. 44; 218). Fonseca left the plant and spoke to the organizers who told him that he could retire at half pay after 20 years (J.A. 38; 218). Supervisor Paraggio, who was present, told Fonseca that it was all right to sign because he had just signed. When Fonseca said that he wanted more information, Paraggio called him a troublemaker. Fonseca then signed a card with Local 422 and returned to work. (J.A. 38, 55, n. 44; 218–219.) About 30 minutes later, Fonseca was summoned to Kurtz's office, where President Nadaline was present. Nadaline asked Fonseca if he had joined Local 422, and Fonseca said that he had. Nadaline told Fonseca to go through the plant and tell everyone that the Company was negotiating a new contract with Local 249. (J.A. 6, 38; 219, 407; Tr. 407.) However, by the end of the day, Fonseca had not done so and most of the employees had executed authorization cards for Local 422 (J.A. 6; 376, 377–378).

(d) Edith Wilson, supervisor of the checkers, told employees Kaye Smith and Terry Benson to go downstairs and speak to two men from another union, whom they would find outside (J.A. 6; 243–244). The two employees left the department and spoke

to the two Local 422 organizers as directed. Smith asked if Nadaline knew they were there, and one of the organizers replied that he did and that he wanted Local 422 in his plant and did not want Local 249 (J.A. 40; 243–244). The two employees then signed cards (J.A. 40; 245). They were away from work for about 45 minutes, but were paid for their time (J.A. 244, 246). As Smith and Benson reentered the plant, they met Nadaline who asked whether they had signed with Local 422. Both answered in the affirmative and Nadaline made no comment. (J.A. 6, 40; 245.)

When Smith and Benson returned to the department, Supervisor Wilson asked them if they had signed up and they said they had (J.A. 40; 245). Wilson then sent out two other employees (J.A. 6, 39; 231, 235). Upon their return, Wilson told two more, Virginia Ortiz and Judy Arnaiz, to go downstairs to see about joining another union. They left their work without punching out, spoke to the organizers, and filled out cards. (J.A. 39; 230–232, 235, 365–366.)

3. During the afternoon of May 28, Lloyd McFertride, shop steward for Local 249, learned of the foregoing activity on behalf of Local 422 from a fellow worker in the Bronx plant. He left the plant and walked up to several men, one of whom stated that they were signing up the shop and asked him to sign (J.A. 28; 157–158). Night Foreman Mascara was standing nearby, and he said, "Yes, why don't you go ahead and sign? I signed. John Paraggio signed and all the other supervisors signed" (J.A.

28; 159–160). McFetridge phoned Mack Young, secretary-treasurer of Local 249, and told him what was was happening (J.A. 6–7, 9, 28; 144–145, 160–162). Later that afternoon, when Young was advised that Company assistance to Local 422 was continuing, he told McFetridge to pull the employees out on strike if he could do nothing else (J.A. 7, 9, 29; 145, 161–162). President Nadaline overheard this conversation (J.A. 9, 428), and, when McFetridge hung up, Nadaline asserted that he had four witnesses who had heard Young call a strike (J.A. 29; 162, 429, 405). McFetridge replied that another union was signing up the employees and he had to obey orders (J.A. 29; 403).

At about 5 p.m., Local 249 set up a picket line (J.A. 7, 29; 131, 164). Shortly thereafter, Local 249's business agent, Edward Wisotsky, came to the Bronx plant. He found Nadaline on the street, among the strikers, and told him that assistance to the rival local by the Company supervisory staff had brought on the strike (J.A. 9–10, 30, n. 20; 141–142). Young arrived a few minutes later, and he and Wisotsky went into Nadaline's office to discuss the situation. Like Wisotsky, Young told Nadaline that the strike was the result of the improper conduct of his supervisors (J.A. 9, 30; 120, 146, 433, 435, 410). Young asked Nadaline to resolve the problem by signing the rider to the Association contract, but Nadaline refused. He explained that he could not sign in view of the telegram he had received from Local 422 demanding recognition at Elmsford (J.A. 30, 60; 120, 146–147, 411, 434). During the conference Nadaline received

the second telegram from Local 422, demanding recognition at the Bronx plant (J.A. 30, n. 21; 410, 434, 87). The meeting ended without agreement on a contract, the chief obstacle being the demands of Local 422 for recognition (J.A. 31, 60; 121, 148–149). On September 17, 1962, the strikers at both plants made an unconditional offer to return to work (J.A. 7, 50–51; 294–295). The Company refused to reinstate them (J.A. 7, 71; 293).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that the Company's supervisors had given assistance to Local 422, that the steps taken by President Nadaline were not sufficient to disavow their conduct, and that the Company thus violated Sections 8(a) (2) and (1) of the Act. The Board further concluded that the Company was obligated to bargain with Local 249, and that it violated Section 8(a) (5) and (1) by failing to do so. Finally, the Board concluded that the strike was called to protest the Company's illegal assistance, and that therefore the refusal to reinstate the strikers, after their unconditional offer to return on September 17, was a violation of Sections 8(a) (3) and (1). (J.A. 9–10.)

The Board's order requires the Company to cease and desist from the unfair labor practices found, to withdraw recognition from Local 422, to bargain with Local 249 upon request, to reinstate the striking employees and make them whole, and to post the customary notices (J.A. 11–18).

C. THE COURT OF APPEALS DECISION

The court of appeals found that all of the Board's findings were supported by substantial evidence and enforced its order in full (Pet. App. 3–9).

ARGUMENT

The decision of the court below turns upon the particular facts and is not in conflict with any other decision. There is no occasion for further review.

The case involves only two evidentiary questions—*i.e.*, whether substantial evidence supports the Board's findings that the Company did not effectively disavow the actions of its supervisors, and that the strike was caused by unfair labor practices. Such issues clearly do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the record amply supports the Board's findings. As the court below noted (Pet. App. 7–8):

> Nadaline's alacrity in breaking off contract talks with Local 249 and his failure to do more than speak to a small number of employees with whom he came in contact, when plainly faced with the active encouragement of Local 422 in the plants, the actions of Ricciardi and the supervisors without strong repudiation by Nadaline, all serve to bolster the Board's conclusion of company implication in Local 249's displacement. * * *

And, it is equally apparent that the strike was not, as petitioner claims (Pet. 6–8), caused by other factors, but rather was a direct response to the illegal assist-

ance which the Company offered to Local 422. As the facts summarized in the Statement show (pp. 2–9, *supra*), at the beginning of the strike three different representatives of Local 249—McFetridge, Wistosky and Young—all made it plain to President Nadaline that it was the Company's support of Local 422 that caused the walkout. Nor was the strike converted into an economic one as the result of what occurred at the meeting later in the day between petitioner's president and the Union. For, contrary to petitioner's contention (Pet. 7–8), the Company did not there refuse to enter into the contract which the Union proposed because it disapproved of the terms of the contract, but because Local 422 had demanded recognition (see pp. 8–9, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RALPH S. SPRITZER,
Acting Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel.
LAURENCE S. GOLD,
Attorney,
National Labor Relations Board.

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